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HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *Christina*

**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA)

No. 03-1960

HEATH H. MCWHORTER)
Bar No. 021224)

**AMENDED
HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

A Probable Cause Order was filed on May 25, 2006. A Complaint was filed on June 19, 2006. Respondent filed an Answer on July 17, 2006. A Settlement Conference was held on September 11, 2006 during which the parties reached a settlement. The parties stipulated that Settlement Officer 7G, Jerry Bernstein prepare the Hearing Officer's Report in this matter, pursuant to Rule 57(f)(2). Ariz.R.Sup.Ct. The parties filed a Tender of Admissions and Agreement for Discipline by Consent (Tender) and Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent (Joint Memo) on October 31, 2006. No hearing has been held in this matter.

FINDINGS OF FACT

1. At all times relevant, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on March 19, 2002.
2. In August of 2001, Suzanne Pollard retained attorney Melvin Sternberg to represent her in a domestic relations matter.
3. At the time of retention, Respondent was a recent law school graduate doing research for and providing other assistance to Mr. Sternberg on a project basis.
4. Mr. Sternberg delegated some work related to Ms. Pollard's case to Respondent.
5. When Respondent was admitted to practice law in Arizona in March of 2002 he took on added responsibilities for Mr. Sternberg, including assisting Mr. Sternberg in representing Ms. Pollard.
6. Beginning in September of 2002, Respondent and Ms. Pollard developed a personal relationship.
7. Ms. Pollard invited Respondent to a karaoke performance and the two dated thereafter.
8. Their relationship included rollerblading, attending movies and dining.

9. In October of 2002, they introduced their children to one another, and over time Respondent, Ms. Pollard and their children attended, celebrated or participated together in Halloween, church service and activities, sledding, horseback riding, Christmas, hiking, movies and dining. They also traveled together.

10. The relationship developed to where Respondent and Ms. Pollard introduced each other to their respective families and close friends.

11. The relationship further developed into an intimate one that included sex.

12. On February 25, 2003, at the trial of Ms. Pollard's case, Mr. Pollard testified that Ms. Pollard and Respondent had been engaging in sex. See Transcript of Proceedings, 2/25/03, p. 45-47.

13. On March 4, 2003, Ms. Pollard testified in open court under oath and denied having engaged in sex with Respondent. See Transcript of Proceedings, 3/3/03, p. 59-60.

14. On March 19, 2003, Ms. Pollard testified in open court on cross examination under oath and denied having had a personal, intimate relationship with Respondent and denied having taken trips with Respondent. See Transcript of Proceedings, 3/19/03, p. 38-39.

15. Despite knowing that his client, Ms. Pollard lied under oath about the relationship and the trips they had taken together, Respondent did not take remedial measures.

16. If this matter were to proceed to a hearing, Respondent would testify he did engage in a personal relationship with Ms. Pollard but that the relationship did not pose a conflict of interest for him until Ms. Pollard testified regarding the relationship; that Ms. Pollard's testimony denying the personal relationship surprised Respondent since he expected Ms. Pollard to disclose their relationship on direct examination to avoid the negative effect of disclosure on cross examination; and that he did not take "remedial measures" with respect to Ms. Pollard's known false testimony because he believed it was not "material" to the proceedings as the quoted terms above are used in the relevant ER's.

17. If this matter were to proceed to a hearing, the State Bar of Arizona would offer evidence that Respondent did engage in a conflict of interest by engaging in a personal, intimate relationship with Ms. Pollard; that Ms. Pollard testified falsely with Respondent's advance knowledge if not outright encouragement; that Ms. Pollard's false testimony was material to the proceedings; that Respondent failed to take appropriate remedial measures in light of Ms. Pollard's false testimony; and that, therefore, Respondent violated the ERs cited above as alleged.

18. On October 24, 2003 a friend of Ms. Pollard, Jason Himelstein, filed the complaint with the State Bar. Ms. Pollard was oblivious to the complaint. Mr. Himelstein alleged among other things, that Respondent suborned perjury from Ms. Pollard. Mr. Himelstein further alleged that he had tapes to corroborate the allegation.

19. Because the complaint contained a reference to Respondent's employer/host lawyer, Mel Sternberg, a parallel State Bar file was opened with respect to Mr. Sternberg.

20. Mr. Himelstein failed to respond to requests from the State Bar for the tapes or other promised evidence that allegedly corroborated the facts contained in his complaint.

21. In July of 2004, the State Bar recognized it had a conflict of interest in this matter and referred the case to the Conflicts Case Committee whereupon it was assigned to Volunteer Bar Counsel (VBC).

22. When this matter was referred to VBC, Ms. Pollard was still represented by the Respondent and Mr. Sternberg, and still did not know that her friend had filed the complaint.

24. In November Of 2004, Ms. Pollard was contacted by an investigator for the State Bar of Arizona and interviewed. In her statement, Ms. Pollard acknowledged that Mr. Himmelstein had informed her that he had filed a complaint with the State Bar of Arizona against Respondent and Mr. Sternberg. Ms. Pollard admitted that she and Respondent had engaged in a personal, intimate relationship and had taken trips together, all during the time that Respondent represented Ms. Pollard.

25. On December 1, 2004, the State Bar of Arizona informed Ms. Pollard that it would postpone a decision on whether to initiate proceedings against Respondent and Mr. Sternberg until her attorney-client relationship was terminated.

26. Respondent was notified of the Complaint in March of 2005.

27. In April of 2005, Mr. Himmelstein and Ms. Pollard urged the State Bar to drop this matter, stating that they would not cooperate in these proceedings. Mr. Himmelstein stated that he destroyed the corroborating evidence he had earlier claimed to posses. Thereupon, the State Bar became the Complainant pursuant to Rule 48(g), Ariz.R.Sup.Ct.

28. Following routine request for extensions and the presentation of a Motion to Seal the State Bar's File, Respondent responded to the Complaint on July 26, 2005.

29. Based on information provided by Respondent and by Mr. Sternberg in the Sternberg matter, VBC continued with the investigation.

30. A Probable Cause Order issued herein on May 15, 2006, the formal Complaint was filed on June 19, 2006 and Respondent filed his Answer on July 12, 2006.

31. The State Bar's formal complaint against Respondent alleged violations of ERs 1.7, ER 3.3, ER 3.4, ER 4.1, and ER 8.4, in the form in which they were in effect prior to December 1, 2003.

32. In addition to the admissions and denials of the substantive allegations of the Complaint, Respondent also asserted the affirmative defense of laches, claiming that potentially exculpatory evidence was lost by virtue of the delay between receipt of Mr. Himmelstein's initial complaint and the referral of this matter for the Conflicts Case Committee and VBC.

33. For purposes of settling this matter, Respondent conditionally agrees that by engaging in a personal, intimate relationship with Ms. Pollard, and failing to take appropriate remedial measures following Ms. Pollard's presentation of false testimony, he violated ERs 1.7, 3.3, 3.4, 4.1 and 8.4.

34. For purposes of settling this matter, the State Bar conditionally agrees that it is open to reasonable debate whether Ms. Pollard's false testimony was "material" to the issues in the case as a consequence of which it is fairly

debatable as to whether Respondent was obligated to take appropriate remedial measures. Furthermore, given the lack of cooperation from Mr. Himmelstein and Ms. Pollard, the State Bar conditionally agrees that it would be unable to prove by clear and convincing evidence that Respondent urged Ms. Pollard to lie under oath or that he had advance knowledge that she would lie under oath.

CONDITIONAL ADMISSIONS

Respondent conditionally admits that his conduct in engaging in a personal, intimate relationship with Ms. Pollard, and in failing to take appropriate remedial measures following Ms. Pollard's presentation of false testimony, violated ERs 1.7 (Conflict of Interest), 3.3 (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others) and 8.4(a) (violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (c) (engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and (d) (engage in conduct that is prejudicial to the administration of justice).

The State Bar conditionally admits that it is open to reasonable debate whether Ms. Pollard's false testimony was "material" to the issues in the case as a consequence of which it is fairly debatable as to whether Respondent was obligated to take appropriate remedial measures. The State Bar further conditionally agrees that it would be unable to prove by clear and convincing

evidence that Respondent urged Ms. Pollard to lie under oath or that he had advance knowledge that she would lie under oath.

SANCTIONS

As the appropriate sanction in this matter, Respondent agrees to accept a 30-day suspension from the practice of law, and pay the costs and expenses of the disciplinary proceedings. The State Bar and Respondent believe these sanctions are appropriate under the circumstances.

In determining the appropriate sanction, the parties considered both the American Bar Association *Standards for Imposing Lawyer Sanctions* and Arizona Case Law. The Supreme Court and Disciplinary Commission consistently use the *Standards* to determine appropriate sanctions for attorney discipline. *In re Kaplan*, 179 Ariz. 175, 877 P.2d 274 (1994). The *Standards* are designed to promote consistency in sanctions by identifying relevant factors the court should consider and then applying these factors to situations in which lawyers have engaged in various types of misconduct. *Standard 1.3, Commentary*.

In determining an appropriate sanction, the court and the commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *In re Tarletz*, 163 Ariz. 548, 789 P.2d 1049 (1990); *Standards*, Theoretical Framework at 5: *Standard 3.0*.

With respect to the Conflict of Interest, the applicable *Standard* is 4.3, which reads as follows:

4.3 *Failure to Avoid Conflicts of Interest*

Absent aggravating or mitigating circumstances, upon application of the factors set out in *Standard* 3.0 the following sanctions are generally appropriate in cases involving conflicts of interest:

4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyers own interest, ... and causes injury or potential injury to a client.

To determine the applicability of this *Standard* in this case, the factors listed in the theoretical framework must be considered.

A. The duty violated

The Respondent violated his duties to the client, the most important of all duties described in the Sanctions. See *Standards*, p.5.

B. The lawyer's mental state

Respondent's mental state regarding the impropriety of maintaining a personal relationship with Ms. Pollard was negligent. The relevant ER at the time of the violation was ER 1.7. This ER was interpreted to mean that a lawyer's consensual relationship with a client was not per se violation. *In re Walker*, 200

Ariz. 155, 24 P.3d 602 (2001) (“Our holding here is limited to the particular facts and circumstances of this case. Thus we have yet to determine, and did not today hold, that every instance of consensual sex between attorney and client is a *per se* violation of ER 1.7.” 220 Ariz. at 163, 24 P.3d at 610).

C. The extent of the actual or potential injury:

The actual and potential injury to Ms. Pollard is that she was left in a position of lying under oath to avoid a potentially catastrophic result in her DR case. This exposure to a charge of perjury, not to mention a reopening of her DR matter, may yet become an actual injury. Considering that she may face criminal penalties, this clearly qualifies as a “serious injury.”

Standard 5.1 is relevant to the sanction for Respondent’s *Failure to Maintain Personal Integrity*. It reads:

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate...in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation: 5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements

To determine the applicability of this standard in this case, the factors listed in the theoretical framework must be considered.

A. The duty violated

Respondent violated his duties to the public

B. The lawyer's mental state

Respondent's mental state regarding the failure to maintain personal integrity is "Knowingly." Respondent knew that his client lied and failed to take appropriate remedial measures as required.

C. The extent of the actual or potential injury:

In addition to the injury to Ms. Pollard, further actual and potential injury occurred to the public. The public has the right to know that officers of the court will dependably comport themselves in such a manner as to uphold the ends of justice. The injury done to the public qualifies as a "injury" if not a "serious injury."

The *Standards* relevant to the sanction for Respondent's violation of the False Statements, Fraud, and Misrepresentation rules are:

6.1 *False Statements, Fraud, and Misrepresentation*

involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

To determine the applicability of this *Standard* in this case, the factors listed in the theoretical framework must be considered:

A. The duty violated

Respondent violated his duties to the legal system

B. The lawyer's mental state

Respondent's mental state regarding Ms. Pollard's false testimony is "Knowingly." He knew that false statements were submitted to the court and took no remedial measures.

C. The extent of the actual or potential injury

In addition to the injury to Ms. Pollard and the public, further actual and potential injury was done to the legal system. When it becomes known to Mr. Pollard (which presumably has already occurred) that his ex-wife lied on the witness stand and her lawyer failed to take appropriate remedial measures, he may have

grounds to move to set aside the judgment (to the extent the judgment is adverse to him) and have the case retried. The first trial may turn out to have been a waste of time and taxpayer money, and constitutes at least a potential “injury” if not a potential “serious injury.”

D. The aggravating and mitigating circumstances

In light of this analysis, the presumptive sanction is Suspension. In deciding upon the length of the suspension, the following aggravating and mitigating circumstances should be considered.

1. In aggravation:

Standard 9.22(b) Dishonest or selfish motive:

Standard 9.22(d) Multiple Offenses. The parties regard Respondent’s relationship with Ms. Pollard as a whole as one instance of misconduct and do not regard each episode of the relationship as a separate instance of misconduct. The “multiple offenses” consist of: 1. The personal relationship; 2. The participation in Ms. Pollard’s presentation of false testimony and evidence; and 3. The failure to take appropriate remedial measures when Ms. Pollard lied about the relationship.

Standard 9.32(e), full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

Standard 9.32(f), inexperience in the practice of law;

Standard 9.32(j), delay in disciplinary proceedings;

Standard 9.32(l), remorse.

3. Factors which are neither aggravating nor mitigating are:

Standard 9.4(c), withdrawal of complaint against the lawyer;

Standard 9.4(f), failure of injured client to complain.

Upon consideration of the aggravating and mitigating factors, the parties agree that the presumptive sanction of Suspension remains the appropriate result. The parties further agree that the same factors preponderate in favor of a shorter rather than longer term of Suspension.

II. Proportionality analysis of analogous cases

In the attorney discipline case *In re Cassalia*, 173 Ariz. 732, 843 P.2d 654 (1992), the Supreme Court adopted the axiom that, where there are multiple acts of misconduct, the responding attorneys should receive one sanction that is consistent with the most egregious conduct and any other misconduct would be

Consequently, cases of similar nature are hereinafter provided for guidance in determining an appropriate sanction.

In re James T. Gregory, SB-05-0161-D (2005), the court imposed censure and probation where the attorney made misrepresentations to the court to obtain a continuance of a trial. The sanction in the Gregory was aggravated by the fact of prior discipline which was also for violation of ER 8.4(c).

Other cases resulting in censure for misrepresentations to the court are *In re Fee*, 182 Ariz. 597, 898 P.2d 957 (1995) (respondent knowingly failed to disclose the existence of a separate agreement with his client regarding attorney fees); *In re Risley*, State Bar 05-0015-D (respondent filed a procedurally inappropriate motion and then misrepresented to the court and a non-party witness that the motion had been granted); *In re Hansen*, 179 Ariz. 229, 877 P.2d 802 (1994) (respondent, a city prosecutor, lied to the court and opposing counsel to conceal the fact that she had prematurely released a trial witness); *In re Alcorn*, 202 Ariz. 62, 41 P.3d 600 (2002) and *In re Moak*, 205 Ariz. 351, 71 P.3d 343 (2003), the Court imposed suspensions of six months and six months and one day respectively, where the respondents concealed pertinent facts from the court and caused serious harm to the parties and the legal system.

It appears the appropriate sanction in this case should fall somewhere between the range of censure and a lengthy suspension. This is an appropriate

result based on the significant mitigation. Respondent had been a member of the State Bar of Arizona for not quite one year when the testimony was taken. Immediately after the testimony he took measures to determine whether the testimony was material. He made the determination after consulting with other attorneys that the testimony about the sexual activity of a dissolution litigant was not material where Arizona is a no-fault divorce state, and the issue being litigated regarded property distribution. Whether the testimony was, in fact, material is subject to debate, however respondent does not now dispute that he should have taken corrective measures.

Other mitigating factors also weigh in favor of a short suspension. For example, respondent has no disciplinary history. Moreover, the conduct occurred in February and March 2003. The complainant first informed the State Bar by letter in October 2003. In December 2004, the State Bar informed the client that it would not investigate the matter until the representation ended and did not inform respondent until March 2005. In April 2005, the complaining party represented the State Bar that he had destroyed evidence and would no longer participate in the investigation. Furthermore, the client also informed the State Bar that she wished the complaint withdrawn and refused further participation. The delay and destruction of evidence should be considered as mitigating in this case. Consequently, the parties agree that a short term suspension is appropriate.

This Settlement Officer, now acting as the Hearing Officer for the purposes of this opinion, had the opportunity to meet with Volunteer Bar Counsel, Respondent and his Counsel. Frank and open discussions were conducted during the course of the Settlement Conference. This Settlement Officer finds that a thirty day suspension was the appropriate sanction in the case. The Respondent was a relative neophyte in the practice of law. His first contacts with Ms. Pollard occurred while he was acting in a law clerk capacity. He was also undergoing marital problems at the time which perhaps clouded his judgment.

This Settlement Officer determined that Respondent's youth, the marital issues and bad decision making clouded his judgment. He appears to understand that his conduct was inappropriate and will never be repeated. At the hearing, he was contrite and recognized the consequences of his failure to act in a timely fashion.

This Settlement Officer determined that these are significant mitigating factors. However, Respondent allowed the Court to be misled by the testimony of Ms. Pollard. A sanction of a 30-day suspension instead of censure or probation should be imposed. Respondent, in his inexperience, failed to recognize, at the time, the implications by his failure to act and by his conflict of interest and lack of candor to the Court. Respondent was a participant during the hearing when Ms. Pollard denied a sexual relationship with the Respondent. He failed to alert

the court to this lie. While there may be an issue of confidentiality, he failed to take any immediate remedial steps. Representation should have ceased at that time. By remaining silent, he also placed his client, Ms. Pollard, in the position of being subject to criminal liability, specifically, perjury. His client should have been advised, once Respondent knew that she was lying under oath, of her right to counsel. The limited length of the suspension is due to Respondent's acceptance and understanding of his misjudgment and his youth and inexperience. This Settlement Officer also notes that this conduct occurred about three years ago.

RECOMMENDATION

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is also the objective of the lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigation factors, and a proportionally analysis, the Settlement Officer recommends the following:

1. Respondent shall be suspended for a period of 30-days.
2. Respondent shall pay the costs and expenses incurred in these disciplinary proceedings within 30-days from the date of the final Judgment and Order.

Dated this 5th day of March, 2007.

Jerry Bernstein /cs
Jerry Bernstein
Settlement Officer 7G

Original Filed with the Disciplinary Clerk
this 5th day of March, 2007.

Copy of the foregoing mailed
this 6th day of March 2007, to:

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Copy of the foregoing ~~hand~~-delivered

This 6th day of March, 2007, to:

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